SUMMARY of COOPERATIVE CASES

FARMER COOPERATIVE SERVICE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

SUMMARY NO. 58

DECEMBER 1953

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[Formerly prepared by Mr. Mischler for the Cooperative Research and Service Division of the Farm Credit Administration. This Division is now the Farmer Cooperative Service.]

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

RECOVERY OF EXCESS PAYMENTS FOR PRODUCTS UNDER PURCHASE-AND-SALE TYPE OF CONTRACT

(Elliott v. Adeckes, 59 N.W. 2d 894)

In Elliott v. Adeckes, 59 N.W. 2d 894, which was an action brought by a trustee in bankruptcy for Waverly Creamery Association, a cooperative creamery association, to recover from members and patrons amounts paid for products in excess of the gross receipts and operating expenses of the cooperative, the crucial issue was considered to be the nature of the contractual relationship between the patrons and members and the cooperative. The Supreme Court of Minnesota held that the contractual relationship between the cooperative creamery association and its patrons and members, as found in the statute under which it was organized (L. 1923, c. 326, Sec. 1, M.S.A. §308.05) and under which it operated, its articles of incorporation and bylaws, was one of purchaser and seller; not that of principal and agent. Accordingly, it held that no part of the price paid for products was recoverable from the members and patrons, even though such price may have exceeded the difference between the association's gross receipts from the marketing of such products and its operating expenses during the respective years by periods.

After reviewing the factual situation, the statute, and Waverly's articles and bylaws, the court said, in part:

> "After a careful examination of L. 1923, c. 326, M.S.A. §§308.05 to 308.18, under which Waverly was organized and under which it operated, as well as its articles of incorporation and bylaws, it is our opinion that the contractual relationship between Waverly and the various defendants was one of purchaser and seller. An example of this relationship seems to us to be found in the record in the written contract entered into between Waverly and Brunswick Cooperative Creamery Association, one of the defendants. In that contract Waverly agreed--
>
> > "'* * * to buy all of the whole milk from the Brunswick Coop. Cry. Ass'n, for a period of

> six months from this first day of December, 1948, or longer, paying 23% over New York 92 score butter, with an advance payment of 80% of delivery weekly.'

"Article 1 of the articles of incorporation provides that the purpose of Waverly was to engage in a dairy, manufacturing, and marketing business on a co-operative plan; that the general nature of its business shall be the receiving and buying of milk, cream, and other products of the farm and the manufacture, marketing, selling, and handling of dairy and farm products. The article also provided that Waverly should have the power and authority to own, operate, manage, and control creameries and cream stations and to do and perform, for itself and its individual members and patrons, every act and thing necessary and proper to the conduct of its business or the accomplishment of the purposes set forth therein or permitted by the act under which Waverly was incorporated.

"It is apparent under the language of L. 1923, c. 326, Sec. 1, that a co-operative association organized and operating under this chapter can either engage in a pooling operation or purchase the product outright from its producer members or patrons. Under the circumstances here, we do not consider it necessary to go into any lengthy, detailed discussion of the various types of co-operative associations. It appears from the cases, however, that the first, or so-called pooling co-operative, operates under a marketing agreement whereby it provides a marketing service for the products produced by its members by pooling their products and selling them at a time when the management of the co-operative association deems it advantageous to do so, depending on the condition of the market. Generally under this plan the pool is sold collectively. After deducting the expenses of the entire pool operation, the proceeds are distributed among the various producers in proportion to their respective contribution of products to the pool. See Minnesota Wheat Growers Co-op. Marketing Ass'n v. Huggins, 162 Minn. 471, 203 N.W. 420, wherein it appears that the association involved was that type of marketing co-operative. The second type above referred to is the co-operative association which is set up for the purpose of purchasing the commodities, such as milk or cream, produced by its members or patrons, taking title thereto, and paying for them at the market price current at the time of delivery. Ordinarily, it then processes the raw products into a manufactured article such as butter or cheese and sells the processed or manufactured article at a time and price demanded by the requirements of the particular business conducted by the co-operative. In our opinion, Waverly was organized and functioned as that kind of co-operative.

"As evidence that Waverly operated under the second plan, art. 8, Sec. 1, of its bylaws provided that patrons should be paid at least once a month, or oftener if the board of directors so ordered, for the milk or cream delivered to the association during the preceding month.

"From a practical standpoint it would seem obvious that because of their perishable nature in their raw state the handling of dairy products such as milk and cream would have to differ in respect to marketing from the handling of grain or wool, for example. The former would have to be processed in some form shortly after it was received at the creamery, while the latter could remain in a pool in its original state for months awaiting a favorable selling market.

"We therefore hold that the contractual relationship between Waverly and its patrons and members, as found in the statute under which the association was organized and under which it operated, its articles of incorporation and bylaws, as well as the pleadings before us, was one of purchaser and seller. To hold otherwise, under the facts and circumstances here, would in our opinion tend to defeat the co-operative creamery system. As we see it, few farmers, as patrons or members of such a co-operative association, would be interested in delivering dairy products to a creamery on the basis claimed by plaintiff, namely, that they would be entitled to receive from the creamery the proportionate share of the difference between costs of operation and cash receipts during each calendar year, such difference to be apportioned among the members and patrons in proportion to the amount of butter fat delivered during such calendar year. Neither would they be interested in a plan which might be construed later, as requested by plaintiff, requiring that any payment to any member or patron in excess of that amount be considered an overpayment which might be collected from the patron or member by the creamery association or its trustee in bankruptcy at some later date."

The court also observed that to construe the articles and bylaws of Waverly to require the members or patrons to return the excess to Waverly or its trustee in bankruptcy "would seem repugnant to the provisions" of M.S.A. §300.27, subds. 2 and 3 relating to exemptions from stockholders' liabilities.

The question of the right of a cooperative association to recover excess advances or overpayments for products has been before the courts a number of times, most frequently in connection with advances by a cooperative which functions on a pool basis. Hulbert, Legal Phases of Cooperative

Associations, pp. 145-148. In a marketing cooperative properly organized to carry out the basic cooperative theory of no discrimination between patrons and operation on a nonprofit basis, it is believed that the papers may be drawn so that the association is under a contractual obligation to pay the member or patron only the amount received for his products less authorized deductions regardless of whether the marketing contract involved is the purchase-and-sale or agency type. Under these circumstances, if a member or patron receives more than this amount, he has received something to which he is not entitled, and accordingly the association should be able to recover it; the basis for recovery being the well established principle that no man shall be allowed to enrich himself unjustly at the expense of another or shall be allowed to retain money that in "equity and good conscience" belongs to another. Hulbert, Legal Phases of Cooperative Associations, supra.

The courts have not, however, consistently followed this pure theory, mainly, it is believed, because the articles, bylaws, and other contracts of the cooperative involved in the particular case did not clearly limit the obligation of the cooperative to return to the patron only net proceeds. Where the marketing contract expressly provides for advances and that such advances may be deducted from the receipts of the sale of the product, there is a necessary implication that the grower will reimburse the association for all such advances, and, accordingly, if advances exceed ultimate receipts, the excess is recoverable. California Bean Growers' Ass'n v. Williams, 82 Cal. App. 434, 255 Pac. 751; Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 179 Ark. 338, 16 S.W. 2d 177.

Also, where the association is clearly functioning on an agency basis, excess advances may be recovered. California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601, 117 P. 767.

However, in a Wisconsin case in which the contract provided for advances but also stipulated "that payment shall be made on the 20th day of each month for cheese shipped by the local during the month before the month which precedes the date of payment," the court held that the disbursements made pursuant to the quoted provision were final payments and not advances, and, therefore, the association was not entitled, at the end of the year, to treat such payments as merely advances and recover the excess of such payments over receipts of the sale of such products less expenses. Neith Co-operative Dairy Products Association v. National Cheese Producers' Federation, 217 Wis. 202, 257 N.W. 624, 98 A.L.R. 1403. The instant case, although it does not cite the Neith case, is essentially consistent with it in theory.

The decision in Lewis v. Monmouth County Farmers' Cooperative Association, 105 N.J. Eq. 257, 147 A. 550, that an association doing business "on a cash basis" may recover overpayments for products, unless the association's losses were occasioned by some negligence, fault, or misconduct of the association itself in marketing the products, is not considered inconsistent by the author with the Neith and Elliott cases, in view of the court's statement in the Lewis case that: "By the terms of the charter and bylaws the association, in marketing the produce of the farmer members, was acting as agent of the members, and substantially as a clearing house, . . ."

TAXABILITY TO PATRON OF ALLOCATED INTEREST IN CONTINGENCY RESERVES

(Farmers Grain Dealers Association of Iowa (Cooperative)
v.
United States of America)

In a memorandum decision in Civil No. 1-203 filed October 28, 1953, the United States District Court for the Southern District of Iowa, Davenport Division, held that the proportionate shares allocated to the plaintiff as a stockholder and patron in another cooperative association in a "Reserve for General Contingencies" established by the board of directors on the books of the latter association did not constitute actual or accruable income to the plaintiff in the tax years in controversy. This decision, like B. A. Carpenter (20 T.C. 82; Summary No. 57, p. 1), adds an element of confusion in the field of cooperative taxation, which it had been thought was being considerably clarified by section 314 of the Revenue Act of 1951 and the regulations of the Internal Revenue Service issued pursuant thereto.

Because the facts are so important to an understanding of the decision and they are succinctly states in the memorandum opinion, the opinion is being quoted in full:

> "This is an action for refund of income taxes, some claimed to have been erroneously reported by the taxpayer and paid for the fiscal year 1947, and some to have been erroneously assessed by the Commissioner and paid as a deficiency for the fiscal years 1948 and 1949. The amounts involved follow.
>
> | Taxable year ending August 31 | | |
> |---|---|---|
> | 1947 | Reported and paid | $16,817.45 |
> | 1948 | Assessed and paid | 1,313.89 |
> | 1949 | Assessed and paid | 702.45 |
>
> "The issue here is whether the Commissioner erred in treating as income properly accruable to plaintiff in the three years its alleged proportionate shares of a 'Reserve for General Contingencies' later described in this memorandum. Plaintiff claims the amounts accrued to it were not actual or accruable income in the years in controversy and therefore were erroneously paid and assessed.

"There is no issue as to the payments by the taxpayer, as to filing a proper claim for refund, nor as to the amounts to which plaintiff is entitled if it sustains its contentions.

"The parties joined in a stipulation of facts and these are so found and incorporated in this memorandum by reference.

"Plaintiff is an Iowa cooperative association with its principal place of business at Des Moines, Iowa. It makes its tax returns on an accrual basis and its fiscal year ended August 31.

"Indiana Grain Cooperative, Inc., was an Indiana cooperative association with income tax exempt status, whose fiscal year ended May 31. (As of January 1, 1950, Indiana's corporate existence terminated by merger into Indiana Farm Bureau Cooperative.) Plaintiff was a stockholder and patron of Indiana during 1945 to 1949, inclusive.

"The Articles of Incorporation and By-laws of Indiana grant to its directors full power to establish reserves, make patronage dividend refunds, etc. At their meeting May 26, 1947, Indiana's directors adopted a resolution reciting 'the advisability of establishing reasonable contingency reserves of a substantial nature to protect against losses occasioned by decline in inventory values and for other reasons,' and after allowing for dividends on outstanding stock and payment of patronage dividends, made provision 'that this association carry out of remaining margins to contingency reserve (in) the sum of $750,000.00 to remain, until application, the property of the patrons on whose patronage they were earned in ratio of such patronage.' It was incorporated in the minutes of meeting that counsel for the association in presenting the resolution stated that 'contingencies exist at the end of the fiscal year, such as income tax liability, which make earnings only estimated. If such contingencies should later prove groundless, the reserve will be distributed to patrons.' This so-called 'Contingency Reserve' was established in 1945.

"The directors meeting of May 27, 1948, adopted a motion 'that the reserve for general contingencies be increased by $150,000.00 from the earnings for the fiscal year ending May 31, 1948'. Like action was taken at the meeting of May 27, 1949, which added $200,000.00 to the reserve for general contingencies.

"On Indiana's books plaintiff was credited as of May 31, 1947, with $44,256.45; May 31, 1948, with $3,457.61; and on May 31, 1949, with $1,848.57. Letters of advice from Indiana to plaintiff were issued in each year involved, which were similar except for amounts. That issued in 1947 enclosed check to plaintiff for cash refund, informed plaintiff as to other matters and stated:

> "'For your organization the 1947 distribution is as follows:
>
> "'Reserve for general contingencies (1.608% of Patronage) $44,256.45.'

"Plaintiff contends that the circumstances attending the creation of the reserves for future contingencies and the handling of the same as revealed by the conduct of the parties, and because of the conditions, contingencies and further required action by directors of Indiana and its successor, the amounts were not and are not actually and really plaintiff's property and are therefore not income to plaintiff actually or to be so accrued, and hence cannot be taxable income.

"In the light of the foregoing and of the facts disclosed by the pleadings and stipulation, we turn to the applicable law.

"The Federal law controls. Estate of Putnam v. Commissioner, 324 U.S. 393. The United States Treasury Department, Bureau of Internal Revenue, Regulations 111, Sec. 29.42-2, is in these words:

> "'Income Not Reduced to Possession.--Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made,

> should indicate an absolute transfer from one account to another. If a corporation contingently credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt.' (Emphasis added)

"In speaking of corporation dividends, it was said in the Estate of Putnam v. Commissioner, supra, page 399: 'The stockholder can acquire no interest in a dividend, amounting to an accrual under Sec. 42, before the amount of the dividend and the distributee is determined.'

"It is said in Home Furniture Co. v. Commissioner 4 (Cir.) 168 F. 2d 312, that 'Economic realities, not legal formalities, determine tax consequences.'

"In this case there is nothing to indicate that plaintiff could have demanded payment effectively, in 1947 or any subsequent year, of the amount of $44,256.45 then allocated, or of the amounts allocated in subsequent years. To the contrary, Indiana was depleting the book entry credit to plaintiff by charging items to it. Indiana could have charged out the entire amount had contingencies developed. There was neither promise nor obligation on the part of Indiana to pay a definite amount to plaintiff until the contingencies were determined for which the reserve was originally created. Such determination was not made in 1947. There was never a time that the amount of $44,256.45, shown by Exhibit E of the Stipulation to have been allocated to plaintiff, or the amounts so shown to have been allocated in 1948 and 1949, became subject to plaintiff's 'unqualified demand,' and 'none of the parties understood that it was' to be. See Avery v. Commissioner, 292 U.S. 210, 215. 'It is the command of the taxpayer over the income which is the concern of the tax laws.' Commissioner v. Tower, 327 U.S. 280, 290. Harrison v. Schaffner, 312 U.S. 579, 581. If, by passing to the plaintiff's credit on its books, Indiana gave to plaintiff the command over the amounts allocated, which is the 'concern of the tax laws,' and that amount was available to plaintiff without diminution when distribution was to occur and it had control over distribution, or the time of distribution had been fixed, there might be basis for accruing it as income to plaintiff. However, it has been held in this Circuit, Northwestern States Portland Cement Co. v. Huston, 126,

F. 2d 196, that 'Bookkeeping entries do not produce either income or losses for purposes of taxation.' They are intended to record facts, 'but are merely evidential and do not create or destroy facts.' It was said in Sitterding v. Commissioner (4th Cir.) 80 F. 2d 939, 941, that 'The bookkeeping creates nothing, and the question must be decided according to proven and established facts.' See also Welp v. U. S. (8th Cir.) 201 F. 2d 128. It is said in that case, p. 130:

> "'The objective of the Internal Revenue Code is the ascertainment and reporting of true income and the payment of the proper tax thereon. That objective should not be subordinated to formal methods or practices of bookkeeping or accounting to the extent that income actually accruing in one year be treated as accruing in another by reason of the application of a method of accounting.'

"The court must find that in this case there was never a time in 1947 (nor since, so far as the record reveals) when the amount of the distribution, to be made to plaintiff for any of the years involved, was ascertainable without a formal order of distribution by Indiana of reserves at a given time and in a given amount. Until determination as to amount of distribution had been made by the authority of Indiana, it would not be possible to ascertain or determine the amount to which plaintiff would be entitled, and hence it would not be possible to accrue an ascertainable amount as income. The conduct of the parties is consistent with no other finding.

"It is said in Security Mills Co. v. Commissioner, 321 U.S. 281, 284: 'It is settled by many decisions that a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent.' By the same token, he should not be compelled to accrue as income an amount which is unsettled or the availability of which to him is so highly contingent. The very nature of these reserves made them so and invested them with that uncertainty.

"Fountain City Co-op, etc., v. Commissioner (7th Cir.) 172 F. 2d 666, involved the tax liability of a Wisconsin dairy cooperative. The association had set up a 'patrons Equity Reserve,' which, it was claimed, was the property of its patrons and should not have been included in the gross income of the taxpayer. The opinion holds, p. 667, that 'What part, if any,

should go to the patrons rested in the discretion of the board of directors or a majority of the stockholders' according to Wisconsin law, and 'Until distributed, it all belonged to the association.' The last paragraph of the opinion describes what this court finds to be the situation here.

> "'It is clear from the foregoing that instead of this patrons' equity reserve belonging to the patrons, it never left the control of the association which continued to treat it as its own. Its creation lay within the absolute discretion of the taxpayer's (Indiana's) directors or stockholders and after creation, its continued existence was wholly at the will of the taxpayer's (Indiana's) directors. This reserve never belonged to the patrons. It was and always remained the property of the taxpayer (Indiana) and was properly included by the Commissioner in the taxpayer's gross income.' (Parentheses added)

"I find the issues, therefore, in favor of the plaintiff."

It will be noted that the court in this case does not cite either B. A. Carpenter, supra, or William A. Joplin, Jr. (17 T.C. 1526; Summary No. 54, p. 8) in support of the conclusion reached, but the result lends considerable support to those people who believed that the main reason for the Tax Court's ruling in the latter case that the Joplins did not realize income on reserve credits, was the expression that:

> "In no case should the constructive receipt theory apply, we think, unless at some time the earnings of the cooperative were made available to or were subject to the control of the patron."

The new regulations contained in section 29-22(a)-23 of Regulation 111, as amended by T.D. 6014 (18 F.R. 3168) and issued June 3, 1953, were not, of course, involved in the foregoing decision. It is difficult to predict what effect this decision will have in the administration of such regulations, which make it reasonably clear that amounts "allocated" to patrons by a cooperative, even though they constitute a part of the cooperative's reserves, are to be taken into account by the patron in computing his income tax liability.

EQUALITY OF TREATMENT OF PATRONS

(Bertram v. Danish Creamery Ass'n, 261 P. 2d 349)

In Bertram v. Danish Creamery Ass'n, 261 P. 2d 349, the Third District Court of Appeals of California held that where nothing in the bylaws, articles, or any contract bound a creamery association to take, or any member of the association to deliver, any milk, the association was free to deal with its members on any reasonable basis, and, in so doing, it could apply different conditions of purchase as to members, if, in the interest of the association, there existed reasonable and natural grounds for such varying conditions.

Bertram, a member of the creamery association, had delivered surplus Grade "A" milk to the association from January 1, 1950, to July 15, 1950, during all of which time the association was operating under a resolution duly adopted by its board of directors which provided that "the management be instructed to notify all producers sending Grade 'A' as their surplus, that beginning January 1, 1950, their milk will be received as Grade 'B' milk." (Emphasis added.) Bertram was duly notified by letter of this resolution. He made no formal protest, although at the trial he testified that he told the president he felt the Board's action was discriminatory. He delivered his surplus Grade "A" milk during the period stated above and was paid Grade "B" prices. He then brought this action to recover the balance alleged to be due. The lower court entered judgment of nonsuit, and plaintiff appealed.

The appellate court, after reciting the facts, continued as follows:

> "Quoting from plaintiff's brief, two questions are raised by him on appeal.
>
> "'1. Was the resolution of November 22, 1949 violative of the rights of the plaintiff as a member of the defendant Association?
>
> "'2. Did the Court err in granting the defendant's motion for a nonsuit?'
>
> " He argues in regard to the first question that 'the resolution, in effect, created a group of members of the Association who were treated differently from other members delivering similar products to the Association and that this constituted an unfair and unlawful discrimination against the property rights of the plaintiff as a member of the Association.'

"In view of the stipulation of the parties that there was no agreement between plaintiff and defendant, plaintiff, to maintain his action, had the burden of showing some right to continue to deliver and thereby force the association to accept whatever amount of milk he chose to deliver to it. However, the record shows that the successful operation of the defendant association was in no way dependent upon contractual obligations but to the contrary was predicated wholly upon a voluntary relationship between the association and its members. Thus it necessarily follows that since nothing in the by-laws, articles, nor any contract bound the associato take, or any member to deliver, any milk, the association was free to deal with its members on any reasonable basis; and in so doing could apply different conditions of purchase as to members where, in the interest of the association, there existed reasonable and natural grounds for such varying conditions. The association was not bound to treat each member exactly as it did all the others when to do so would be a detriment to the association. It may be conceded it could not unfairly discriminate but it could discriminate. Mooney v. Farmers' Mercantile & Elevator Co., 138 Minn. 199, 164 N.W. 804.

"It remains then to determine whether the resolution under attack was a proper exercise of the powers of the Board of Directors in the management of the affairs of the association and if said resolution was in anywise unfairly discriminatory as to plaintiff. As previously noted, the by-laws gave to the Board the management and control of the business of the association and, as a necessary adjunct of said power, to make any and all rules and regulations necessary for the successful operation of the association not inconsistent with the by-laws of this state. We conclude that the resolution was a proper exercise of the powers so conferred upon the Board. It did not create a new class of member as plaintiff contends. It merely set forth a reasonable procedure to be followed in all cases where surplus Grade 'A' milk was delivered to the association; the result being that all Grade 'A' producers who chose to deliver their surplus production would be paid at Grade 'B' prices. Thus, a member who chose to follow such procedure was treated equally with all other members who likewise chose to follow such procedure to deliver surplus Grade 'A' milk to the association. Therefore it cannot be said that the resolution did not operate equally upon all persons in that particular class: to-wit, producers of surplus Grade 'A' milk. Lindsay-Strathmore Irrigation Dist. v. Wutchumna Water Co., 111 Cal. App. 688, 296 P. 933.

"From the record before us it is apparent that plaintiff failed to prove facts necessary to entitle him to a judgment, and therefore the trial court properly granted defendant's motion for a nonsuit. Raber v. Tumin, 36 Cal. 2d 654, 226 P. 2d 574."

VOTING RIGHTS RESTRICTIONS IN FARMER COOPERATIVE

(Thomason v. Clark County Farm Bureau Tobacco Cooperative, Inc., 259 S.W. 2d 64)

In Thomason v. Clark County Farm Bureau Tobacco Cooperative, Inc., 259 S.W. 2d 64, the Court of Appeals of Kentucky held that (1) under the Kentucky Revised Statutes, 272.100 to 272.350, the denial of all voting rights to preferred stockholders or the grant of conditional voting rights to common stockholders of a cooperative was not invalid, and (2) a revocation of the voting rights of certain of the common stockholders on the grounds of non-cooperation was valid where the stockholders' contracts with the cooperative, as evidenced by the stock certificates, articles, and bylaws, expressly provided for such revocation under the reasonable safeguard of opportunity for hearing before revocation.

The opinion of the court follows:

> "The Clark County Farm Bureau Tobacco Cooperative, Inc., pursuant to a vote of a majority of such of its stockholders as were recognized by the board of directors as having the right to vote, contracted to sell its principal asset, a tobacco warehouse, to L. E. Thomason and Alvin Dickey. In order to test the question of whether the cooperative could convey good title, this declaratory judgment action was brought. Thomason and Dickey have appealed from the judgment, which held that a deed from the officers of the cooperative would convey good title.
>
> "The sole question is whether the action of the board of directors of the cooperative, revoking the voting rights of some 5,300 stockholders, was valid. If this action, taken before the meeting at which it was voted to sell the warehouse, was invalid, it is conceded that the necessary majority vote for the sale of the warehouse was not obtained.
>
> "The articles of the cooperative provide for common stock having a par value of $1 per share, with voting rights, and preferred stock having a par value of $100 per share, without voting rights. Each common stockholder is entitled to only one vote, regardless of the number of shares owned by him. The bylaws do not permit voting by proxy.
>
> "At the time of organization of the cooperative, some 200 persons purchased common stock, in quantities sufficient to raise approximately $29,000. Preferred stock in the amount of $36,550 also was sold.

"Under the bylaws, it was provided that any producer who sold tobacco at the warehouse of the cooperative must agree to take at least one share of common stock, the cost of which could be collected by being added to the warehouse charges. Pursuant to this clause, some 5,300 persons became stockholders by reason of marketing their tobacco at the cooperative's warehouse.

"Each certificate for common stock issued by the cooperative contained the following provision:

> "'* * * If the Board of Directors shall find, subsequent to a hearing, that any of the stock evidenced hereby has come into the hands of any person who is not eligible for membership, or that the holder thereof has ceased to be an eligible member, or that the holder thereof has failed to cooperate with the Association, he shall have no privileges on account of such stock or vote or voice in the management and affairs of the association (other than the right to participate in accordance with the law in case of dissolution and to receive the book value of such stock in the event of its sale or transfer as herein provided) * * *.'

"This provision in the stock certificates also appeared in the articles and bylaws of the cooperative.

"When the cooperative was first organized, in 1945, its warehouse was the only one in Clark County. Subsequently, three privately-owned warehouses were opened, and it appears that these new warehouses have taken the major part of the tobacco marketing business. Many of the stockholders of the cooperative have sold their tobacco through the new warehouses. The cooperative has lost money.

"In 1950, the board of directors of the cooperative called a meeting of the stockholders to vote on the question of selling the warehouse, but the meeting was not attended by a sufficient number of persons to obtain a majority vote of the stockholders for the sale. Thereafter, in November 1952, the board of directors designated a committee to hold hearings on the question of revoking the voting rights of noncooperating stockholders, pursuant to the provision in the articles and bylaws hereinbefore mentioned. Notices were mailed to the 5,300 producer-stockholders, at the addresses shown on the stock register, stating the time and

place at which a hearing would be held on the question of revoking their voting rights. The hearing was held, and the committee then reported to the board of directors a finding that the 5,300 stockholders had failed to cooperate with the association. Thereupon the board adopted a resolution revoking the voting rights of these stockholders. There is nothing in the record to show any protest or objection to this action by any of the stockholders.

"Since it appears that the board of directors carefully followed the provisions of the articles and bylaws in revoking the voting rights, there is no reason why their action should be held invalid unless the articles and bylaws violate a statute or invade some constitutional right.

"The governing statutes, under which the cooperative was organized, are KRS 272.100 to 272.350. These statutes do not guarantee a vote to every stockholder; they provide only that no stockholder may have more than one vote. KRS 272.190 (4). Specific authority for determining the conditions of membership, and for suspending the rights of members or expelling members, is found in KRS 272.150, which states, among other things, that the bylaws may provide for:

> "'(i) The number and qualification of members of the association; the conditions precedent to membership; the conditions under which members may withdraw or transfer their stock; the conditions under which membership shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership; the manner and effect of expulsion; * * *.'

"KRS 272.130 states that when the stock of a cooperative is divided into preferred and common, the articles may provide what privileges are granted to each class. There is no question of the validity of denying all voting rights to the preferred stockholders, and we see no reason why conditional voting rights may not be granted to the common stockholders.

"We find nothing in the statutes to invalidate the provision for revocation of voting rights contained in the articles and bylaws of this cooperative.

"There appears to be no basis for any claim of invasion of constitutional rights. The stockholders' contracts with the corporation, as evidenced by the stock certificates, articles and bylaws, expressly provided for revocation of voting rights on the ground of noncooperation. In view of the purpose and object of cooperative marketing associations, lack of cooperation furnishes a sound reason for suspension of rights or privileges. The revocation clause affords reasonable protection to the stockholders in requiring that they be given an opportunity for a hearing before the revocation may be made.

"There is no suggestion of unfairness or overreaching in the transaction. It appears that the price for which the warehouse was sold is a fair price. The competition from the privately-owned warehouse is such that it seems wise for the cooperative to have sold its warehouse while it could still obtain a fair price. If any sum remains from the sale price, after the preferred stockholders have been paid, all the common stockholders will share equally."

I.C.C. AGAIN AMENDS TRIP-LEASING REGULATIONS

On November 30, 1953, the Interstate Commerce Commission entered three separate orders in Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, which (1) modified the rule pertaining to the utilization by authorized carriers under leases or other arrangements, of equipment which had previously transported that group of commodities referred to generally as agricultural commodities whose transportation is partially exempt under the Interstate Commerce Act, and of equipment which is controlled and operated by farm cooperative associations, (2) further deferred the effective date of the two provisions of the rules prescribing the duration of leases of equipment and the manner in which compensation for leased equipment should be computed, and (3) reopened the proceeding for further hearing solely with respect to these two deferred provisions.

To further explain the intent and scope of the three orders, the Commission issued a press release on December 7, 1953, reading in part as follows:

> "With respect to equipment now partially exempt from regulation, the Commission, having in mind possible adverse effects the so-called 30-day and division of revenue provisions of the leasing rules would have upon farmers and farm cooperatives and upon the orderly movement of agricultural commodities to market, and consonant with the public interest, has modified the rules to allow maximum freedom of movement of such equipment on return from market destinations by excepting such equipment from both the 30-day and the division of revenue provisions of the rules, subject only to certain safeguards designed to protect the public and regulated carriers against abuse of the exception. This modification also simplifies the previous exceptions to the 30-day provision by providing one rule having uniform application to all equipment now partially exempted from regulation under the agricultural exemptions prescribed in the act. This modification in favor of agricultural transporters is intended as a permanent exception to the 30-day provision.

"In addition, in view of the fact that the record in this proceeding is almost 5 years old, and in consideration of the extreme controversy engendered by the 30-day and compensation provisions, as indicated by the pendency of restrictive legislation before the Congress, the Commission deemed it appropriate to reexamine these two provisions and their effect on the operations of motor carriers, other than those transporting agricultural commodities. In order to have the record reflect more recent experience of the industry, the effective date of these two provisions and, therefore, their applicability to regulated motor carriers, has been further postponed for another 12 months beyond March 1, 1954, to March 1, 1955, and the proceeding has been reopened for further hearing solely with respect to these two provisions. Such further hearing will not affect the permanent exception to the 30-day provision discussed in the preceding paragraph."